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Decision 89 04 048 APR 12 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

CITY OF HEALDSBURG, Complainant, vs. PACIFIC GAS AND ELECTRIC COMPANY, Defendant. (U39E)	Mailed APR 14 1989 Case 88-04-031 (Filed April 11, 1988)

O P I N I O N

Summary

The Commission concludes that Pacific Gas and Electric Company (PG&E) has authority to serve the single commercial property that is the subject of this complaint. However, since PG&E has waited over 20 years to assert its rights, the City of Healdsburg (City) should continue to provide service to this property.

This Proceeding

On April 11, 1988, the City filed a complaint with the Commission alleging that PG&E's proposed electric service to Precision Redwood Manufacturing Company (PRMCO) located at 33 Healdsburg Avenue in Healdsburg would be made without valid franchise rights. City alleged that: (a) PG&E's franchise rights did not entitle them to upgrade and extend its line as contemplated; (b) PG&E's proposed action would violate Public Utilities (PU) Code § 1001; and, (c) PG&E's proposed action would be a violation of PG&E's stipulation in the proceedings leading to

Decision (D.) 42443 dated January 25, 1949, which awarded a certificate of public convenience and necessity (CPC&N) to PG&E.

In its complaint, City requested that the Commission issue an order requiring PG&E to cease and desist from any construction work necessary to provide the proposed service. PG&E agreed to cease construction, pending a decision on the merits of the complaint.

On May 31, 1988, the parties filed Stipulated Facts having determined that an evidentiary hearing was not necessary. Opening briefs were filed on June 15, 1988. Closing briefs were filed on July 1, 1988, and the matter was submitted for decision.

Background

PG&E states that a single customer, unprompted by PG&E, approached it with a request for electric service. As it would for any other customer in its service territory, PG&E furnished PRMCO with information regarding terms and conditions of service. The proposed service would be provided under authority of a Sonoma County electric franchise granted in 1948 and a CPC&N granted by the Commission in 1949.

City believes that this case is significant beyond the issue of whether PG&E or the City serves the single customer involved in these proceedings.

City notes that Healdsburg is a very small city of about 3.2 square miles and 8,800 population. Well over half the geographic area of the City lies in areas incorporated since 1948. PG&E has over 10 miles of transmission and distribution lines running through these annexed areas. In addition, PG&E has lines surrounding the City in unincorporated areas.

City contends that if PG&E can extend any of these lines in private easements, or in the public rights-of-way by virtue of a Sonoma County franchise granted prior to annexation of these areas, PG&E is in a position to lure away major commercial and industrial customers located in the City and presently served by the City.

Accordingly, City believes that a campaign by PG&E to take away major customers from the City would be devastating to the City's electrical operation.

PG&E asserts that, as it did for PRMCO, PG&E will certainly consider legitimate requests for service coming from customers located within its service territory. PG&E's actions imply no more than that. Based on the agreed-upon facts of this case, PG&E submits that City has no legitimate basis on which to argue that a decision for PG&E in this proceeding will result in a full-scale marketing effort on the part of PG&E to acquire City's commercial and industrial customers.

Agreed-Upon Facts

The agreed-upon facts are summarized below:

1. Since about 1900, City has supplied electricity to most of the residential, commercial, and industrial buildings within the original boundaries of the city.

2. City has supplied electricity to most of the residences and buildings within annexed areas from the time of annexation, but does not serve several residential and small customers in the annexed areas.

3. City has supplied and continues to supply the three-phase 12,000 volt electric power requirements of the property subject to this complaint, since the property was annexed (Annexation 22, September 3, 1957) and since development in about 1965 for industrial use.

4. PG&E provides electric service to the public in the County of Sonoma, including portions of the County annexed by City subsequent to 1949.

5. The property occupied by PRMCO, which is the subject of this complaint, was not located within the limits of City prior to January 25, 1949. City did not serve this site prior to Annexation 22 (September 3, 1957).

6. By letter dated September 30, 1987, PRMCO requested a proposal from PG&E to supply electric service to this property; on March 14, 1988 the parties reached agreement and executed contracts for three-phase 12,000 volt service.

7. In order to serve PRMCO, PG&E intends to convert an existing two wire, single phase service in the vicinity of PRMCO to a three wire, three-phase service. Starting from an existing PG&E pole the existing line crosses a public road, then it traverses the distance of three more existing PG&E poles (about 350 feet). The last of these four poles is the terminus of the existing PG&E single phase line. From that point the line will be extended underground (about 250 feet) to PRMCO entirely on private property.

8. Some of the poles and a portion of the single phase line are in the public right of way; a portion of the three-phase line will be in the public right of way. All four poles have been in existence since at least 1948. At no time, has City objected to these poles or the service provided by them to other PG&E customers located in the annexed areas.

9. PG&E is currently providing electric service in the County of Sonoma under grant of an indeterminate franchise contained in Ordinance 267 passed January 19, 1948, by the Board of Supervisors of Sonoma County.

10. PG&E requested and was granted by the Commission, in D.42443, dated January 25, 1949, a CPC&N to exercise the rights and privileges contained in Ordinance 267.

11. PG&E has no franchise from the City to construct or place electrical lines in the city limits. However, City does allow PG&E to serve customers within its city limits, as specified in the paragraph below.

12. City has on numerous occasions taken over PG&E facilities (and related service to customers) which were located in areas annexed by City, either by condemnation proceedings or by voluntary agreement with PG&E. In various areas, PG&E facilities in

existence at the time of annexation were not taken by City and PG&E continued to serve customers from these facilities.

13. PG&E contends that it currently serves approximately 69 residential and commercial customers located within these annexed areas within the boundaries of the city. City contends that PG&E serves 23 residential and commercial customers located within these annexed areas located within the boundaries of the city. All such customers were being served by PG&E prior to the time that the areas in which such customers are located were annexed.

14. The population of City is about 8,500. City's electric distribution system has about 4,366 meters.

The Issue

The issue is: when the Commission issued PG&E the CPC&N in D.42443, did the Commission intend a prohibition on PG&E competing with City in areas subsequently annexed?

City's position is that the Commission intended such a blanket prohibition on competition. City relies on language contained in the body of the decision.

PG&E's position is that the decision limited it from competing within the limits of the City (and Reed Court) as it then existed (in 1949). PG&E relies on Ordering Paragraph 1 of the decision.

Since City and PG&E rely on different portions of the same decision, the portions that are at issue are set forth. The body of the decision contains the following paragraph:

> "Pacific Gas and Electric Company and its predecessors have supplied electricity in portions of Sonoma County for many years. Except for the City of Healdsburg, which purchases electricity from applicant and distributes it within the city and to five customers in Reed Court (a small area adjacent to the city limits and now in process of annexation), no other public or private agency furnishes electric service in the county. Applicant stipulated that it does not now, and

will not in the future, compete with the City of Healdsburg in providing such service." (Emphasis added, p. 2, D.42443.)

The order portion of the decision is set forth below:

"O R D E R

"Public hearing having been held on the above-entitled application, the matter having been submitted, the Commission being fully advised and hereby finding that public convenience and necessity so require,

"IT IS HEREBY ORDERED that Pacific Gas and Electric Company be and it is granted a certificate of public convenience and necessity to exercise the rights and privileges conferred by Ordinance No. 267 of the Board of Supervisors of the County of Sonoma, State of California, adopted January 19, 1948, within such parts or portions of said county as are now served by Pacific Gas and Electric Company or hereafter may be served by it through extensions of its existing system made in the ordinary course of business, as contemplated by Section 50(a) of the Public Utilities Act, subject, however, to the following conditions:

"1. That, except upon further certificate of this Commission first obtained, applicant shall not exercise said franchise for the purpose of supplying electricity in those portions of Sonoma County now being served by the City of Healdsburg and defined as the City of Healdsburg and the adjacent area known as Reed Court.

"2. That the Commission may hereafter, by appropriate proceeding and order, limit the authority herein granted to applicant as to any territory within said county not then being served by it." (Emphasis added, p. 4, D.42443.)

Position of City

The Stipulation Not-to-Compete

City states that in the body of the decision, the Commission recited as a fact: "Applicant stipulated that it does not now, and will not in the future, compete with the City of Healdsburg in providing such service." (P. 2, D.42443.) This sentence was not immediately preceded or followed by any qualifications or limitation. Since, as recited in the body of the decision, PG&E stipulated that it would not now or in the future compete with City, City believes that the issue is whether the Commission should now amend its order to enforce the PG&E stipulation.

City readily acknowledges that the order portion of D.42443 contained a more limited restriction, i.e., the order directed PG&E not to compete with the City within its then existing boundaries and the area known as Reed Court. Also, City acknowledges that PG&E's application stipulated it would not compete within the then existing boundaries of City. Since no mention of Reed Court was made in the application, City contends that this is evidence that more than perfunctory attention was given to PG&E's stipulation. According to City, either the Commission made a mistake in drafting its decision, or PG&E's stipulation was changed during the proceedings after the PG&E application was filed. In any case, City submits that PG&E should have timely filed a Petition for Modification to correct the discrepancy.

However, City argues that there is nothing inconsistent between PG&E's stipulation recited in the body of the decision and the more limited restriction contained in the Commission's order. According to City, the general rule of construction according to the California Code of Civil Procedure (CCP) § 1858 requires that nothing be omitted nor nothing inserted, and that parts of an instrument be construed so as to give effect to them all.

City further argues that if the Commission assumed (correctly or incorrectly) that the County franchise would continue to be valid in subsequently annexed territory, it would have been most unwise of the Commission to prohibit PG&E from serving territories which might be annexed by City in the future, because the Commission did not know whether or not such territories would be served, in whole or in part, by City. According to City, an order completely barring PG&E from competing with City in annexed areas would have prevented the very practical and cost saving arrangements that have in fact resulted. Namely, City has left intact PG&E service to some customers already being served in annexed areas to avoid wasteful expenditures of public monies. City believes that PG&E's stipulation not to compete with City now or in the future was intended by the Commission to be self enforcing.

City submits that from the Commission's perspective, if City elected not to serve an annexed area, in whole or in part, PG&E would not be barred by the Commission's order from providing service; if City did elect to service such area, PG&E would be barred by its self enforcing stipulation. City notes that the final paragraph of the order, (Ordering Paragraph 2, D.42443) reserved the right for the Commission to thereafter limit the authority granted as to any territory not then being served - the means by which the Commission could enforce PG&E's stipulation if PG&E did not honor its stipulation.

Lastly, City argues that PG&E had ample opportunities to petition the Commission to correct any inaccurate characterization of its stipulation. It did not. Therefore, City contends that the PG&E stipulation described in the body of the decision was unlimited and unqualified that PG&E "does not now and will not in the future compete with the City of Healdsburg in providing such service."

The County Franchise

City argues that this Commission held as early as 1917, that a county electric franchise does not continue to be valid in an area which is subsequently incorporated into a city and in which area the franchise had not theretofore been exercised. (So. Sierras Power Co. (1917) 13 CRC 374 (D.4399).)

Also, City argues that the franchise granted by Sonoma County by its terms did not intend to, and in fact did not, grant a franchise to PG&E to use the public streets within the boundaries of city as they existed in 1948 or as such boundaries were later extended by annexation, except as and to the extent that PG&E had perfected franchise rights by exercising the franchise in the annexed areas prior to the annexation.

According to City, if PG&E believed that it had franchise rights in annexed territories beyond facilities in place, it would have planned this extension to go down the public right-of-way in a straight line from its existing terminal pole. Instead, PG&E is resorting to the elaborate and more expensive scheme of moving a pole onto private property and then proceeding underground through intervening private property to reach the property of this customer. City views this is an admission by PG&E that it has no rights under the County franchise granted by Ordinance 267 beyond the physical point at which facilities are in place at the time of annexation.

City does not contest the franchise rights of PG&E as to facilities in place. City would likely not oppose the right of PG&E to upgrade or reasonably change the location of a line for the sole purpose of meeting the upgrade or other changed requirements of an existing customer; that case is not before the Commission. However, City argues that upgrading and relocating an existing line for the sole purpose of extending such service via private property easements is a clear and substantial change in the use of the franchise beyond its use at the time of annexation.

PU Code § 1001

City notes that PU Code § 1001 prohibits an electrical corporation from constructing an extension of a line without a CPC&N, with certain named exceptions. According to City, PG&E's proposed extension fits none of the exceptions.

City argues that the extension is within a city within which PG&E has not lawfully commenced operations. City acknowledges that PG&E presently serves approximately 23 customers within the city limits of City. These customers were being served in unincorporated areas by PG&E when City incorporated such areas. Therefore, City argues that PG&E did not "commence" operations within the City at any time to serve these customers.

City further argues that the customer to be served is not "contiguous" to PG&E's existing service line; to reach the proposed customer PG&E proposes to cross two separate parcels of private property not being served by PG&E a total distance of approximately 225 feet. City contends that the proposed extension is not necessary in the "ordinary course of (PG&E) business." Its sole purpose is to serve a single customer presently served by City.

In summary, it is City's contention that PG&E's proposed action is not covered by any of the PU Code § 1001 exceptions; therefore, if PG&E desires to serve this customer, PG&E must file an application for a CPC&N.

PG&E's Position

The Stipulation Not-to-Compete

PG&E argues that it is clear from its application for a CPC&N that the stipulation was limited to the boundaries of the city as they existed at the time of the application. PG&E's application provided in pertinent part:

> "...that your applicant in its public utility business of furnishing and supplying electricity in said County of Sonoma is not competing with said City of Healdsburg, and alleges that the certificate of public convenience and necessity herein sought is not

> for the purpose of authorizing it to enter into the territory now supplied by said City, or to compete with it in the business of furnishing or supplying electric service in territory in said County of Sonoma now served by said City; and your applicant hereby stipulates and agrees that it will not, without an order of the Commission authorizing it so to do, exercise any right or privilege granted to it by said Ordinance No. 267 of the Board of Supervisors of the County of Sonoma for the purpose of competing with said City of Healdsburg in the business of furnishing and supplying electricity in that part or portion of the County of Sonoma now served by said City." (Pp. 9-10, A.29556.) (Emphasis supplied.)

Thus, according to PG&E, the statement contained in the body of the decision is accurate, yet incomplete. PG&E contends that the Commission recognized the "now served" limitation on PG&E's agreement not to compete with City and reflected this in Ordering Paragraph 1 of the decision. The language of the ordering paragraph tracked the language of PG&E's application.

PG&E submits that City's complaint attempts to eliminate the "now being served" limitation in the decision and ignores the fact that the area now proposed to be served was not being served by City when the decision was issued.

PG&E argues that the Commission could easily have prohibited PG&E from competing with the City as it existed in 1949 and as it would exist thereafter; yet it chose to limit PG&E from competing with the City in the then existing boundaries and the soon to be annexed Reed Court area--"a small area adjacent to the city limits and [then in the]...process of annexation." (P. 2, D.42443.)

PG&E asserts that the specific reference to the Reed Court area leaves no doubt that the Commission's intent was to narrow the prohibition on PG&E's competition with the City. The Commission attempted to define precisely the boundaries of City as they existed at the point in time the decision was issued. In

doing so, it noted in particular Reed Court. According to PG&E, this specific reference to an area in the process of annexation conflicts with City's interpretation that the Commission ordered a blanket prohibition on PG&E's competition with the City.

Next, PG&E addresses City's reference to California CCP § 1858 which provides that in the construction of statutes or instruments nothing should be omitted nor nothing inserted, and that parts of an instrument be construed so as to give effect to them all. If anything, according to PG&E, this general proposition supports a reading of D.42443 which gives effect to Ordering Paragraph 1; it simply does not lead to the conclusion that the limitation in Ordering Paragraph 1 should be ignored.

Second, according to PG&E, where a general provision and a particular provision of an instrument are inconsistent, the latter is paramount to the former (CCP § 1859). In this case, the instrument at issue - D.42443 - contains two provisions regarding PG&E's competition with the City. The provision in the body of the decision is a general statement that PG&E will not compete, whereas Ordering Paragraph 1 limits the prohibition on PG&E's competition within the City to the then existing boundaries of the City. According to PG&E, Ordering Paragraph 1 is a more particular version of the earlier statement. Therefore, PG&E argues, assuming there is any inconsistency at all between these two provisions - an inconsistency PG&E does not find - the ordering paragraph should govern.

Lastly, PG&E argues that City's complaint is an Application for Rehearing, as it were, which is 40 years too late. In requesting an amendment to D.42443 outright, City has admitted as much. This admission supports PG&E's contention that the current certificate fully authorizes it to serve PRMCO without further action of the Commission. Moreover, according to PG&E, City has not adequately demonstrated that any reason exists to modify or amend D.42443.

The County Franchise

PG&E's position is that it has unlimited Sonoma County franchise rights in areas of the city annexed subsequent to 1948. According to PG&E, City's reliance on Sierras is misplaced. This case has nothing to do with the continuing validity of county franchise rights in portions of a city annexed subsequent to the grant of the county franchise.

Addressing City's argument that these rights are limited to rights perfected prior to annexation, PG&E points out that the Commission has held to the contrary on this issue. In Los Angeles Gas and Electric Corporation v Southern California Gas Company (1923) 23 CRC 510, complainant argued that Southern California Gas Company (SoCalGas) was not authorized to serve portions of the City of Inglewood recently annexed, which had previously been a part of unincorporated Los Angeles County. Defendant SoCalGas held a gas franchise from Los Angeles County and a certificate to exercise that franchise from the Commission. In resolving this dispute, the Commission held:

> "In deciding that the defendant should serve a part of the disputed territory, we conclude adversely to plaintiff's contention that the annexation proceedings had the effect of terminating the rights which defendant held under the county franchise as to this annexated territory. We think it is well settled that annexation does not affect franchise rights theretofore acquired..." (Id., p. 512.)

PG&E contends that SoCalGas' franchise and service territory rights in Los Angeles County are similar to the rights held by PG&E in Sonoma County. Under the facts of this case, the "franchise rights theretofore acquired" were not limited, as City would have this Commission believe, to the rights perfected prior to annexation. In fact, the Commission permitted SoCalGas upon further order to extend additional lines within the annexed areas.

PG&E notes that in deciding Los Angeles, the Commission relied on Russell v Sebastian (1913) 233 U.S. 195, which defined the scope of franchise offers broadly. PG&E argues that the United States Supreme Court has interpreted a franchise as not simply the privilege of maintaining facilities actually installed, but also the privilege to install additional facilities that may be necessary to provide service. In effect, "[t]he breadth of the offer [is] commensurate with the requirements of the undertaking which was invited." (Id., p. 206. See also Cal. Jur. 3d Franchises From Government Sec. 16.) Accordingly, PG&E contends that the franchise granted to it by Sonoma County was a broad grant of authority to maintain electric facilities and to install additional electric facilities throughout the County necessary to fulfill the undertaking invited - electric service to the public.

Furthermore, PG&E notes that in Pacific Telephone and Telegraph v City of Los Angeles, (1955) 44 Cal. 2d 272, the California Supreme Court interpreted franchise rights broadly. In Pacific Telephone, the City of Los Angeles argued the very same "perfected" rights theory with respect to a state franchise which had been granted to the telephone company. The court stated:

> "The city claims that state franchise rights did not extend into areas where there had been no streets or telephone service prior to annexation. We do not agree. The grant of a state franchise to use highways and other public places in operating a telephone system necessarily contemplates that new streets will be opened and old ones lengthened as undeveloped areas become settled...A telephone system must be continually expanded to meet the demands of the public and the right to use streets and public places in establishing such a system is commensurate with the duty which is undertaken to provide adequate service. (Id., p. 277.)

Similarly, PG&E contends that the grant of an electric franchise is a broad grant of authority to maintain existing facilities and install future facilities when necessary.

Further, PG&E argues that its franchise in Sonoma County is a valid contract between PG&E and the County. (Russell; County of Tulare v City of Dinuba (1922) 188 Cal. 664.) It is protected from impairment by subsequent legislation by both the federal and California Constitutions. (U.S. Const. Art. 1, Sec. 10; Cal. Const. Art. 1, Sec. 9, formerly Sec. 16.) Clearly, a franchise is a vested right protected by contract principles. In County of Tulare, the court stated:

> "It is, of course, established law that the vested rights of an individual...under an executed franchise are contractual and that such rights cannot be impaired by any subsequent enactment of the state, under the contract clause of the federal constitution, section 10, article 1, forbidding the enactment by the states of any law impairing the obligations of contracts." (Id., p. 669.)

Therefore, PG&E argues that upon annexation, an annexing city assumes the contractual obligations of the annexed territory. (Dickson v City of Carlsbad (1953) 119 Cal. App. 2d 809.) Therefore, PG&E contends that in this instance, City has taken on the contractual obligations of Sonoma County with respect to its franchise granted to PG&E. Sonoma County Ordinance 267 recognizes the fact that the installation of facilities permissible under this franchise will not take place all at once. Therefore, this contractual right continues in effect in those portions of Sonoma County annexed by City subsequent to the grant of franchise.

PG&E notes that City makes much of the fact that PG&E prefers to serve the customer at issue here by extending its line through private property instead of installing additional facilities on the public road. City characterizes this as an "elaborate and more expensive" scheme to avoid directly confronting

the issue of continuing franchise rights for facilities not previously installed. According to PG&E, its sole objective in choosing this route was to serve the customer in the most expeditious and convenient manner possible. PG&E states that throughout this dispute, PG&E has not dodged the issue of the continuing validity of franchise rights by arguing that the contemplated service to PRMCO will not, in fact, require the installation of additional facilities on public streets. PG&E could easily have responded to City's franchise claims by noting that the rights which will be exercised to serve PRMCO (the existing facilities on the public road) were perfected prior to annexation. According to PG&E such an argument is unnecessary. PG&E has franchise rights granted by Sonoma County which continue to be valid.

PU Code $ 1001

PG&E contends that in other service territory disputes, the Commission has held that the grant of a Section 50(b) (or PU Code $ 1002) certificate to exercise franchise rights precluded additional action by the Commission under PU Code $ 1001. In San Gabriel Valley Water Company v Southern California Water Company (1977) 82 Cal. P.U.C. 609, the Commission made it clear that where a utility has a franchise right to serve an area, it requires no further action of the Commission in order to provide service to customers in the ordinary course of business. The Commission determined:

> "No additional certificate was required by SoCal under Section 1001 of the Public Utilities Code to provide water service in the Mission Gardens area because SoCal had a certificate (D83030) to exercise the rights, privileges, and franchise granted by the city of Rosemead by Ordinance No. 376 (1974) to provide water service in that city. (Id., p. 618.)
>
> "SoCal provides general water service in the city of Rosemead. It is not required under Article 1, Chapter 5 of Division 1 [Section

> 1001, et seq.] of the Public Utilities Code to seek an additional certificate of public convenience and necessity to serve the Mission Gardens area." (Id., p. 619, Finding of Fact No. 21.)

Accordingly, in San Gabriel, the Commission permitted SoCal Water Company to serve, without an additional certificate, approximately 150 customers it had not previously served located within its existing franchised service territory.

PG&E points out that in the current proceeding, a single customer has requested service from PG&E. As provided by D.42443, PG&E has lawfully commenced operations in Sonoma County and currently provides electric service to approximately 69 customers in the City. As the Stipulated Facts reveal, PG&E has lawfully commenced operations in areas of the City annexed subsequent to 1949, including the area in the vicinity of PRMCO. Furthermore, the existing facilities being converted from single-phase to three-phase service to provide service to PRMCO have been in existence since at least 1948. Therefore, PG&E argues that the type of service contemplated here--service to a single customer within PG&E's franchised service territory--certainly falls under the franchise exception to PU Code § 1001 set forth by the Commission in prior cases.

Lastly, PG&E argues that City is not a utility of like character, and PG&E's extension of service into contiguous territory is not prohibited by PU Code § 1001.

According to PG&E, City has not fulfilled its public utility obligations to its customers in the same manner required of utilities regulated by the Commission. On numerous occasions, City has obtained PG&E facilities in annexed areas through condemnation or purchase. Yet, the transfer of customers to City was never absolute or complete within these annexed areas. PG&E contends that City, perhaps to avoid more burdensome service obligations, has left to PG&E approximately 69 customers within these areas.

Moreover, PG&E contends that City's annexations are often made for the purpose of obtaining a single large industrial customer for its electrical system, without care or concern for the smaller residential or commercial customers located within the annexation.

Discussion

We believe that the ordering paragraph in D.42443 and the paragraph in the body of the decision describing the stipulation are consistent. We reach this conclusion because of the words "such service" contained in the last sentence of the paragraph at issue. Construing the sentence preceding, it appears that "such service" (i.e., the service for which PG&E was committing not to compete) refers to service that City was then providing within the city and to five customers in Reed Court. However, for purposes of discussion, we will assume that there is an inconsistency.

The Stipulation Not to Compete

The issue is whether the limitation contained in the ordering paragraph of the decision is controlling.

We note that in Witkin's California Procedure it states:

> "JUDGMENT
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> (c) [§5] Opinion of Trial Court.
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> An oral or written opinion by a trial judge, discussing and purporting to decide the issues in the manner of an appellate court opinion, is merely an informal statement of his views. It may be helpful in framing the judgment, or on appeal in interpreting ambiguous or uncertain portions of the judgment. But it is not itself the decision of the court or a judgment." (California Procedure, 3rd. Ed., Vol. 7, p. 455, emphasis added.)

Also, we note that in California Jurisprudence, it states:

> "APPELLATE REVIEW
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> § 559. Opinion; reason for decision
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> A decision of a reviewing court is its judgment. The opinion of the court states the reasons given for that judgment..." (Cal. Jur. 3rd. Ed., Vol. 5, p. 271.)

Therefore, in terms of the Commission's decision at issue, the statement in the body of the decision is part of the "opinion"; the ordering paragraphs are the Commission's "decision."

Further, we note that there is no support for the position that inconsistencies in the written opinion somehow modify or negate the decision. In Magarian v Moser, the court stated:

> "[2] We have been shown no authority to support appellant's argument that the written opinion of the trial judge constituted a part of the court's decision and that its inconsistency with the findings and a conclusions filed deprives the judgment of the support and conformity required by law. It is obvious that the judgment as entered must be supported by and conform to the findings (Nestor v Burr, 124 Cal. App. 369 [12 Pac. (2d) 479]), but it seems equally clear that a written opinion of the trial court is no more a part of the decision rendered than an oral pronouncement can be and that such opinion, even if inconsistent with the formal conclusions reached by the court, cannot be made the basis for a reversal when the findings, conclusions and judgment are consistent." (5 Cal. App. 2d 210.)

Therefore, it follows that the ordering paragraph at issue is the final decision of the Commission. It is not subject to modification by prior statements contained in the opinion.

Turning to the arguments raised by the parties, both City and PG&E argue that CCP $ 1858 supports their respective positions. This section states:

> "$ 1858. Construction of statutes or instruments; duty of judge
>
> Construction of statutes and instruments, general rule. In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several

> provisions or particulars, such as a construction is, if possible, to be adopted as will give effect to all." (CCP $ 1858, emphasis added.)

We will attempt to apply $ 1858 to the two statements at issue. Section 1858 requires that, if possible, we give effect to both provisions. In attempting to do so we are confronted with the "now being served" limitation in the ordering paragraph. This limitation would be completely negated if we give effect to the statement in the body of the decision that PG&E "stipulated that it does not now, and will not in the future, compete with the City." Since it is not possible to give effect to both statements, we conclude that $ 1858 does not provide a sufficient basis to resolve the matter before us.

Next, PG&E cites CCP $ 1859 as being supportive of its position that the ordering paragraph controls. The section states:

> "$ 1859. Construction of statutes or instruments; intent
>
> The intention of the legislature or parties. In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (CCP $ 1859, emphasis added.)

As we view the two parts of the decision at issue, we conclude that the statement in the body of the decision that PG&E will not compete is a general statement. On the other hand, Ordering Paragraph 1 limits competition to the then existing boundaries of the city. We conclude that Ordering Paragraph 1 is a more limited or particular version of the former. Accordingly, we agree with PG&E that CCP $ 1859 supports the position that the ordering paragraph of the decision is paramount.

Lastly, we note that the language in PG&E's application for a CPC&N tracks the language in the ordering paragraph. On the other hand, we do not have any record to either prove or disprove City's argument that PG&E could have changed its stipulation during the course of the proceeding. In the absence of any evidence, if we were asked to speculate, we would conclude that since there was no mention in the decision of such a change in PG&E's position from what was stated in its application, there was no change to the stipulation. It seems to us that such an important change, if such a change had occurred during the course of the proceeding, would not have gone unmentioned.

However, we realize there is no mention of Reed Court in the application, but it is mentioned in the ordering paragraph. We know that Reed Court was being annexed at the time. Since it was being annexed and would thereafter be included within city limits, the inclusion of Reed Court in the ordering paragraph appears to be a logical extension of PG&E's agreement not to compete within the then existing boundaries of the city. To take this argument one step further, if PG&E had changed its stipulation during the course of the proceeding, to never compete in the future within city boundaries, then there would have been no need to mention Reed Court in the ordering paragraph because such mention would have been unnecessary. Therefore, we believe that the inclusion of Reed Court in the ordering paragraph suggests that the stipulation was not changed during the course of the proceeding. Also, it suggests that the Commission crafted the ordering paragraph with care and there was no mistake. But, we do not rely on such speculation to decide this matter.

In summary, we conclude that case law and CCP § 1859 support a finding that the ordering paragraphs of D.42443 are the decision of the Commission. These paragraphs are not subject to modification by any statement contained in the body of the decision.

Franchise Rights

We will address City's argument that the franchise rights granted by Sonoma County Ordinance 267 are limited in annexed territories to the rights perfected by use of PG&E prior to annexation. City contends that a county electric franchise does not continue to be valid in an area which is subsequently incorporated into a city (annexed) and in which area the franchise has not theretofore been exercised. So. Sierras Power Co. (1917) 13 CRC 374 (D.4399).

Our review of Sierras leads to the conclusion that, as argued by PG&E, this case is not on point. The two franchises involved in Sierras are entirely dissimilar from the Sonoma County franchise at issue. The first franchise in Sierras was limited to a term of three years. It lapsed because the applicant failed to complete construction in three years as required. The second franchise was obtained from the county after the city was incorporated. In the case before us, the Sonoma County franchise is an indeterminate franchise with no such construction requirements, and PG&E obtained this franchise before the area at issue was annexed. Therefore, City's reliance on Sierras is misplaced.

The law is clear that county franchises are assigned by operation of law to the annexing city. A franchise is a contract. Its transfer upon annexation in no way diminishes or extinguishes the rights or obligations under it. It is a broad grant of authority to maintain existing facilities and install future facilities when necessary. (Russell v Sebastian, (1913) 233 U.S. 195.)

The dispute here involves PG&E's franchise rights in portions of the county annexed after the franchise was granted. Upon annexing any portion of the county, City steps into the shoes of the County of Sonoma with regard to the obligation to allow PG&E

to extend its system in city streets "so far as may be necessary" to serve its customers. In Russell the United States Supreme Court stated:

> "It is no impeachment of the extent of the franchise that all rights conferred thereby are not exercised at once."
>
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> "The very nature of the subject-matter of franchises for supplying water and artificial light to municipalities presupposes that the grantee will, at the beginning, occupy but a small portion of the area in which the franchise is to operate, and later, with growth and expansion, will occupy the whole area." (Russel, Book 58, Law Ed., p. 914.)

Therefore, since PG&E's franchise is for an indeterminate period, we are not persuaded by City's argument that PG&E's rights are limited to rights exercised or perfected prior to annexation. We conclude that PG&E has unlimited franchise rights in areas of the city annexed subsequent to 1948.

PU Code § 1001

We note PG&E's argument that City is not a utility of "like character" and PG&E's extension of service into contiguous territory currently served by it is not prohibited by PU Code § 1001.

Also, we note City's explanation for its selective condemnation of large industrial customers. According to City, it affords a "very practical and cost saving arrangement." Therefore, City has left intact PG&E service to some customers already being served in annexed areas to avoid wasteful expenditures of public monies.

Notwithstanding that PG&E has a CPC&N and franchise which authorizes it to serve this customer, PG&E waited more than 20 years to assert its rights. PG&E failed to act when the

property at issue was developed for industrial use in 1965. Regarding such failure to exercise operative rights, we have stated:

> "Holders of dormant operative rights should not be encouraged to...reassert them to compete with others who have adequately served the field." (Highway Express & Forwarding Co., (1944) 45 Cal. R.R.C. 312.)
>
> "...when a utility possesses a certificate granting it the right to serve a territory, it should proceed with due diligence to exercise the same within a reasonable time, and if it does not it has no just cause for complaint when a vigilant and persuasive utility is allowed to enter the field." (Gas Fuel Serv. Co., (1933) 38 Cal. R.R.C. 861.)
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> "A certificate not exercised in any particular territory or to any particular class of consumers is not entitled to protection from the Commission after a newcomer, able and willing to render service, has entered the field, and a utility not exercising a certificate should be placed in the same category as a utility without a certificate when competition comes knocking at the door." (Gas Fuel Serv. Co., (1933) 38 Cal. R.R.C. 861.)

City has been providing electric service to this customer for more than the last 20 years and is currently doing so. Therefore, we conclude that City should continue to serve the property that is the subject of this complaint.

With regard to PG&E's argument that the customer's preference should receive consideration, we recently considered this issue in a dispute involving Southern California Edison Company and San Diego Gas & Electric Company. In D.88-09-022 dated September 14, 1988, we cited a prior Commission decision in the application of California Water Service Co., where we stated:

> "[2] If customers or would-be developers were allowed to pick and choose between neighboring utilities for their own economic advantage, the

> situation would be highly unstable and utility planning not only impossible but meaningless. Certainly the public interest always must enter into the consideration, but we must be concerned with the overall welfare of all the public involved in that utility's service territory, and not merely with that of a subdivider and his protective customers located in the immediate area of the proposed subdivision." (10 CPUC 2d, 690, 697.)

Therefore, in this instance, we are not prepared to consider an individual customer's preference.

We note City's argument that a favorable decision for PG&E in this matter will precipitate a campaign by PG&E to lure away major commercial and industrial customers located within areas annexed subsequent to 1948. We agree that this decision is favorable to PG&E to the extent it reaffirms that PG&E is authorized to serve customers in those areas. On the other hand, this decision is favorable to City to the extent that City may keep the customer it already serves.

With regard to the future, we see no reason for City to be apprehensive. City states that it uses PG&E's tariff schedules and then discounts the amount charged commercial customers by 7%. The customer at issue (PRMCO) receives this discount. Notwithstanding this customer's preference for PG&E, we believe not many of City's commercial customers will switch if City continues to provide the discount.

Findings of Fact

1. PG&E is currently providing electric service in the County of Sonoma under grant of an indeterminate franchise contained in Ordinance 267 passed January 19, 1948, by the Board of Supervisors of Sonoma County.

2. PG&E requested and was granted by the Commission, in D.42443, dated January 25, 1949, a CPC&N to exercise the rights and privileges contained in Ordinance 267.

3. PG&E provides electric service to the public in the County of Sonoma, including portions of the County annexed by City subsequent to 1949.

4. The property occupied by PRMCO, which is the subject of this complaint, was not located within the limits of City prior to January 25, 1949. City did not serve this site prior to Annexation 22 (September 3, 1957).

5. By letter dated September 30, 1987, PRMCO requested a proposal from PG&E to supply electric service to this property; on March 14, 1988 the parties reached agreement and executed contracts for three-phase 12,000 volt service.

6. City has supplied and continues to supply the three-phase 12,000 volt electric power requirements of the property subject to this complaint, since the property was annexed (Annexation 22, September 3, 1957) and since development in about 1965 for industrial use.

7. The ordering paragraph in D.42443 prohibits PG&E from competing with City within the limits of the city (and Reed Court) as it then existed in 1949.

8. The body of D.42443 contains a statement that PG&E stipulated that it does not now (1949), and will not in the future compete with City in providing "such service."

Conclusions of Law

1. The words "such service" contained in the last sentence of the paragraph at issue construed in conjunction with the preceding sentence, means that PG&E stipulated not to compete with City in the then existing city limits and in Reed Court.

2. Assuming for the sake of argument that the ordering paragraphs and a paragraph in the body of the decision are inconsistent, the ordering paragraphs are the final decision of the Commission. The ordering paragraphs are not subject to modification by a prior inconsistent statement contained in the body of the decision (Magarian v Moser).

3. CCP § 1859 supports a finding that, in the construction of an instrument, when a general and particular provision are inconsistent the latter is paramount to the former.

4. In terms of CCP § 1859, the stipulation not to compete in the future is a general provision. The limitation in the ordering paragraph to areas "now being served" is a particular provision. The latter provision is paramount to the former.

5. Case law and CCP § 1859 support the conclusion that the ordering paragraph controls. The ordering paragraph is not subject to modification by a prior inconsistent statement contained in the body of the decision.

6. As set forth in Ordering Paragraph 1 of D.42443, PG&E shall not compete with City within the boundaries of the city as they then existed, at the time the CPC&N was granted on January 25, 1949.

7. There is no limitation on PG&E competing with City in areas annexed after January 25, 1949.

8. The property at issue, now occupied by PRMCO, was not within city limits prior to January 25, 1949. Therefore, PG&E is entitled to serve the property.

9. City originally served the property occupied by PRMCO. It has adequately and continuously served that property for more than 20 years.

10. Under these specific facts, since PG&E has allowed City to serve the property at issue for more than 20 years, PG&E should not now be permitted to reassert its rights to serve the property.

11. This Commission encourages municipally-owned utilities, investor-owned utilities, and affected customers to try to resolve disputes, such as the present one, among themselves.

O R D E R

IT IS ORDERED that:

1. Ordering Paragraph 1 of Decision (D.) 42443 is controling. Even assuming that this ordering paragraph is inconsistent with the paragraph at issue contained in the body of the decision, the ordering paragraph is not subject to modification by the prior inconsistent paragraph.

2. Since Pacific Gas and Electric Company waited for over 20 years to assert its rights under D.42443, the City of Healdsburg should continue to serve the property located at 33 Healdsburg Avenue in Healdsburg.

This order becomes effective 30 days from today.

Dated APR 12 1989, at San Francisco, California.

G. MITCHELL WILK
President
STANLEY W. HULETT
JOHN B. OHANIAN
Commissioners

Commissioner Frederick R. Duda being necessarily absent, did not participate.

Commissioner Patricia M. Eckert present but not participating.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director

Moreover, PG&E contends that City's annexations are often made for the purpose of obtaining a single large industrial customer for its electrical system, without care or concern for the smaller residential or commercial customers located within the annexation.

Discussion

We will discuss the legal issues in the order set forth above.

The Stipulation Not to Compete

The issue is whether the limitation contained in the ordering paragraph of the decision is controlling.

We note that in Witkin's California Procedure it states:

> "JUDGMENT
>
> (c) [§5] Opinion of Trial Court.
>
> An oral or written opinion by a trial judge, discussing and purporting to decide the issues in the manner of an appellate court opinion, is merely an informal statement of his views. It may be helpful in framing the judgment, or on appeal in interpreting ambiguous or uncertain portions of the judgment. But it is not itself the decision of the court or a judgment." (California Procedure, 3rd. Ed., Vol. 7, p. 455, emphasis added.)

Also, we note that in California Jurisprudence, it states:

> "APPELLATE REVIEW
>
> § 559. Opinion; reason for decision
>
> A decision of a reviewing court is its judgment. The opinion of the court states the reasons given for that judgment..." (Cal. Jur. 3rd. Ed., Vol. 5, p. 271.)

Therefore, in terms of the Commission's decision at issue, the statement in the body of the decision is part of the "opinion"; the ordering paragraphs are the Commission's "decision."

Further, we note that there is no support for the position that inconsistencies in the written opinion somehow modify or negate the decision. In Magarian v Moser, the court stated:

> "[2] We have been shown no authority to support appellant's argument that the written opinion of the trial judge constituted a part of the court's decision and that its inconsistency with the findings and a conclusions filed deprives the judgment of the support and conformity required by law. It is obvious that the judgment as entered must be supported by and conform to the findings (Nestor v Burr, 124 Cal. App. 369 [12 Pac. (2d) 479]), but it seems equally clear that a written opinion of the trial court is no more a part of the decision rendered than an oral pronouncement can be and that such opinion, even if inconsistent with the formal conclusions reached by the court, cannot be made the basis for a reversal when the findings, conclusions and judgment are consistent." (5 Cal. App. 2d 210.)

Therefore, it follows that the ordering paragraph at issue is the final decision of the Commission. It is not subject to modification by prior statements contained in the opinion.

Turning to the arguments raised by the parties, both City and PG&E argue that CCP § 1858 supports their respective positions. This section states:

> "§ 1858. Construction of statutes or instruments; duty of judge
>
> Construction of statutes and instruments, general rule. In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such as a construction is, if possible, to be adopted as will give effect to all." (CCP § 1858, emphasis added.)

We will attempt to apply § 1858 to the two statements at issue. Section 1858 requires that, if possible, we give effect to both provisions. In attempting to do so we are confronted with the "now being served" limitation in the ordering paragraph. This

limitation would be completely negated if we give effect to the statement in the body of the decision that PG&E "stipulated that it does not now, and will not in the future, compete with the City." Since it is not possible to give effect to both statements, we conclude that § 1858 does not provide a sufficient basis to resolve the matter before us.

Next, PG&E cites CCP § 1859 as being supportive of its position that the ordering paragraph controls. The section states:

> "§ 1859. Construction of statutes or instruments; intent
>
> The intention of the legislature or parties. In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (CCP § 1859, emphasis added.)

As we view the two parts of the decision at issue, we conclude that the statement in the body of the decision that PG&E will not compete is a general statement. On the other hand, Ordering Paragraph 1 limits competition to the then existing boundaries of the city. We conclude that Ordering Paragraph 1 is a more limited or particular version of the former. Accordingly, we agree with PG&E that CCP § 1859 supports the position that the ordering paragraph of the decision is paramount.

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stipulation. It seems to us that such an important change, if such a change had occurred during the course of the proceeding, would not have gone unmentioned.

However, we realize there is no mention of Reed Court in the application, but it is mentioned in the ordering paragraph. We know that Reed Court was being annexed at the time. Since it was being annexed and would thereafter be included within city limits, the inclusion of Reed Court in the ordering paragraph appears to be a logical extension of PG&E's agreement not to compete within the then existing boundaries of the city. To take this argument one step further, if PG&E had changed its stipulation during the course of the proceeding, to never compete in the future within city boundaries, then there would have been no need to mention Reed Court in the ordering paragraph because such mention would have been unnecessary. Therefore, we believe that the inclusion of Reed Court in the ordering paragraph suggests that the stipulation was not changed during the course of the proceeding. Also, it suggests that the Commission crafted the ordering paragraph with care and there was no mistake. But, we do not rely on such speculation to decide this matter.

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Therefore, in this instance, we are not prepared to consider an individual customer's preference.

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With regard to the future, we see no reason for City to be apprehensive. City states that it uses PG&E's tariff schedules and then discounts the amount charged commercial customers by 7%. The customer at issue (PRMCO) receives this discount. Notwithstanding this customer's preference for PG&E, we believe not many of City's commercial customers will switch if City continues to provide the discount.

Findings of Fact

1. PG&E is currently providing electric service in the County of Sonoma under grant of an indeterminate franchise contained in Ordinance 267 passed January 19, 1948, by the Board of Supervisors of Sonoma County.

2. PG&E requested and was granted by the Commission, in D.42443, dated January 25, 1949, a CPC&N to exercise the rights and privileges contained in Ordinance 267.

3. PG&E provides electric service to the public in the County of Sonoma, including portions of the County annexed by City subsequent to 1949.

4. The property occupied by PRMCO, which is the subject of this complaint, was not located within the limits of City prior to January 25, 1949. City did not serve this site prior to Annexation 22 (September 3, 1957).

5. By letter dated September 30, 1987, PRMCO requested a proposal from PG&E to supply electric service to this property; on March 14, 1988 the parties reached agreement and executed contracts for three-phase 12,000 volt service.

6. City has supplied and continues to supply the three-phase 12,000 volt electric power requirements of the property subject to this complaint, since the property was annexed (Annexation 22, September 3, 1957) and since development in about 1965 for industrial use.

7. The ordering paragraph in D.42443 prohibits PG&E from competing with City within the limits of the city (and Reed Court) as it then existed in 1949.

8. The body of D.42443 contains a statement that PG&E stipulated that it does not now (1949), and will not in the future compete with City.

Conclusions of Law

1. As recited in the body of D.42443, the stipulation not to compete in the future negates the limitation in the ordering paragraph that PG&E not compete with City within the city limits as they then existed (in 1949). These two statements are inconsistent.

2. The ordering paragraphs of D.42443 are the final decision of the Commission. These ordering paragraphs are not subject to modification by the prior inconsistent statement contained in the body of the decision (Magarian v Moser).

3. CCP § 1859 supports a finding that, in the construction of an instrument, when a general and particular provision are inconsistent the latter is paramount to the former.

4. In terms of CCP $ 1859, the stipulation not to compete in the future is a general provision. The limitation in the ordering paragraph to areas "now being served" is a particular provision. The latter provision is paramount to the former.

5. Case law and CCP $ 1859 support the conclusion that the ordering paragraph controls. The ordering paragraph is not subject to modification by a prior inconsistent statement contained in the body of the decision.

6. As set forth in Ordering Paragraph 1 of D.42443, PG&E shall not compete with City within the boundaries of the city as they then existed, at the time the CPC&N was granted on January 25, 1949.

7. There is no limitation on PG&E competing with City in areas annexed after January 25, 1949.

8. The property at issue, now occupied by PRMCO, was not within city limits prior to January 25, 1949. Therefore, PG&E is entitled to serve the property.

9. It is the Commission's policy that where a CPC&N has not been diligently exercised, when others have entered the field, the utility that has failed to exercise its CPC&N should not be permitted to reassert its rights.

10. Since PG&E has allowed City to serve the property at issue for more than 20 years, PG&E should not now be permitted to reassert its rights to serve the property.

O R D E R

IT IS ORDERED that:

1. Ordering Paragraph 1 of Decision (D.) 42443 is controling. It is not subject to modification by the prior inconsistent statement contained in the body of the decision.

2. Since Pacific Gas and Electric Company waited for over 20 years to assert its rights under D.42443, the City of Healdsburg should continue to serve the property located at 33 Healdsburg Avenue in Healdsburg.

This order becomes effective 30 days from today.

Dated _____, at San Francisco, California.